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No. 98-84

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

R. M. SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Court of Appeals correctly held—in conflict with this Court's decision in *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), decisions of other federal circuits, and the clear intent of Congress—that the National Collegiate Athletic Association, a private organization that does not itself receive federal financial assistance, is subject to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, because it receives payments from entities that do.

PARTIES TO THE PROCEEDING

This action was brought by respondent Renee M. Smith, plaintiff-appellant below, against petitioner National Collegiate Athletic Association ("NCAA"), defendant-appellee below, a voluntary, unincorporated association consisting primarily of public and independent colleges and universities. Smith and the NCAA were the only parties to the proceeding in the court whose judgment is under review. After entry of that judgment, Smith was granted leave to file an amended complaint adding as defendants Hofstra University and the University of Pittsburgh. Because they were not parties to the proceeding below, the university defendants have not appeared in this Court.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 139 F.3d 180 and reprinted in the appendix to the petition for certiorari ("Pet. App.") at 1a. The opinion of the District Court for the Western District of Pennsylvania is reported at 978 F. Supp. 213 and reprinted at Pet. App. 21a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1998. *Id.* 37a-38a. Both parties filed timely petitions for rehearing and suggestions for rehearing in banc, which were denied on April 20, 1998. *Id.* 39a. The petition for certiorari was filed on July 14, 1998, and granted on September 29, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681(a), provides in part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Other pertinent statutory and regulatory provisions are reprinted in the addendum hereto.

INTRODUCTION

This case concerns the reach of Title IX to private entities or organizations that do not receive federal aid, but have members that do. Title IX by its terms applies to programs or activities "receiving Federal financial assistance." 20 U.S.C. § 1681(a). In *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597, 610 (1986), this Court held that "Title IX"—like the other program-specific statutes with the same federal funding trigger—"draws the line of federal regulatory coverage between the recipient and the beneficiary."[1] It "covers those who receive the aid, but does not extend as far as those who benefit from it." *Id.* at 607. The "key" in gauging when federal coverage attaches is thus to determine whether the defendant

[1] In addition to Title IX, the program-specific statutes include Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d (emphasis added), which prohibits discrimination against persons on the basis of race, color, or national origin in "any program or activity *receiving Federal financial assistance*"; Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794 (emphasis added), which prohibits discrimination against disabled persons in "any program or activity *receiving Federal financial assistance*"; and Section 303 of the Age Discrimination Act of 1975, 42 U.S.C. § 6102 (emphasis added), which prohibits discrimination against persons on the basis of age in "any program or activity *receiving Federal financial assistance*."

"*receive*[*s*] federal financial assistance." *Id.* (emphasis in original).

This limitation not only follows naturally from the text and purpose of Title IX, but is compelled by its origin. Title IX was enacted pursuant to Congress' spending power, U.S. Const. art. I, § 8, cl. 1, and thus acts to "condition[] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1997 (1998). This contractual obligation runs to and stops with the recipient that knowingly and voluntarily assumes it in exchange for federal funds; as this Court recognized last Term in *Gebser*, the obligation may not be expanded on the basis of vicarious liability or agency law principles. *Id.* at 1996, 1999.

Like most private membership organizations, the National Collegiate Athletic Association ("NCAA")—an association of the Nation's colleges and universities—does not itself receive federal aid. Many of its members, on the other hand, do. The Third Circuit held below that the NCAA is covered by Title IX because it "receives dues from its members which receive federal funds." Pet. App. 16a. That ruling flouts the clear intent of Congress to limit Title IX "to those who actually 'receive' federal financial assistance," *Paralyzed Veterans*, 477 U.S. at 605, departs from the framework this Court has established for determining when federal coverage attaches, and, if embraced, would extend Title IX to entities that have never knowingly or voluntarily entered into the Spending Clause contract with the federal government. It should be reversed.

STATEMENT OF THE CASE

Most colleges and universities receive federal financial assistance triggering coverage under Title IX and the other program-specific statutes.[2] In the case of Title IX, the

[2] Colleges and universities are eligible to participate in a number of federal grant and other programs, including those covering stu-

receipt of such assistance obligates an institution—"as a *quid pro quo* for the receipt of federal funds," *Paralyzed Veterans*, 477 U.S. at 605 (quotation omitted)—not to discriminate on the basis of sex in any "education program or activity" offered by the institution. 20 U.S.C. § 1681(a). That includes athletics. *See* 34 C.F.R. § 106.41(a) (prohibiting discrimination "in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient"). A recipient's duty to comply with Title IX "is not obviated or alleviated by any rule or regulation of any * * * athletic or other league, or association" to which it belongs. *Id.* § 106.6(c).

The NCAA is a voluntary, unincorporated association with some 1200 members, consisting primarily of public and independent colleges and universities across the country, as well as certain athletic conferences, associations, and other education institutions. In contrast to most of its members, the NCAA itself does not receive federal financial assistance—whether in the form of grants, loans, or participation in other federal aid programs. Instead, the NCAA funds its activities through the receipt each year of approximately $200 million in revenues from television royalties, championship events, and various sales and services. The NCAA also collects about $900,000 annually in dues from its members, accounting for less than one percent of the NCAA's total annual operating revenues.

The NCAA was founded in 1906 at the urging of President Theodore Roosevelt to quell public outcry over recent deaths in college football. Since then, it has "play[ed] a critical role in the maintenance of a revered tradition of amateurism in college sports." *NCAA* v.

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dent grants and loans, construction and maintenance of education facilities, research, and faculty training and development. *See* 34 C.F.R. pt. 100, App. A (compiling statutory programs).

Board of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984). Toward this end, the NCAA adopts and helps to enforce rules—called legislation—governing such matters as athletic events, eligibility, recruitment, admissions, financial aid, and size of athletic squads and coaching staffs. Members vote on NCAA legislation at annual conventions, and agree to abide by and enforce those rules when they join the NCAA. *See NCAA* v. *Tarkanian*, 488 U.S. 179, 183 (1988).[3]

While the interests of the NCAA and its members overlap, they are not coterminous. As one court put it, "[t]he NCAA serves the common need of member institutions for regulation of athletics while correlating their diverse interests." *Arlosoroff* v. *NCAA*, 746 F.2d 1019, 1022 (4th Cir. 1984). Thus, while NCAA rules or enforcement actions reflect the views of the membership *as a whole*, they may be at direct odds with the interests of individual members. In fact, as this Court has recognized, the NCAA and individual members sometimes act "much more like adversaries than like partners." *Tarkanian*, 488 U.S. at 196. In addition, the NCAA constitution draws clear lines between the association and particular members. Thus, while the charter authorizes the NCAA to pass legislation governing intercollegiate athletics, NCAA const. art. 5, it provides that "[t]he control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself." *Id.* art. 6.01.1.

This case arises due to the application of one of the NCAA's rules to respondent. Smith played intercollegiate volleyball for St. Bonaventure University during the 1991-

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[3] The NCAA constitution expressly embraces the "principle of gender equity." NCAA const. art. 2.3.2. The constitution not only directs the NCAA to operate "in a manner free of gender bias," but states that "[it] is the responsibility of each member institution to comply with federal and state laws regarding gender equity." *See id.*

92 and 1992-93 seasons. She elected not to play during the 1993-94 season, and graduated early. Smith then entered postgraduate programs at Hofstra University and the University of Pittsburgh, where she sought to renew her intercollegiate volleyball career. Under the NCAA's postbaccalaureate rule—which governs when student-athletes may participate in intercollegiate athletics at a postgraduate institution other than the one from which they received their undergraduate degree—she was ineligible to do so. Hofstra and the University of Pittsburgh sought a waiver of this rule in Smith's case, but the NCAA denied their requests and the universities refused to permit Smith to participate in their intercollegiate volleyball programs. *See* Pet. App. 3a-4a.

Smith thereupon brought this action alleging that the NCAA had violated Title IX by refusing to waive the postbaccalaureate rule, seeking both monetary and declaratory relief. *See* Pet App. 2a n.1 & 3a-4a.[4] The NCAA moved to dismiss on the ground that the complaint failed to allege that the NCAA is a federal funding recipient, and that, even if it had, Smith could not establish that the NCAA receives any federal assistance that would trigger Title IX. In response, Smith argued that the NCAA is subject to Title IX because its *members* receive federal funding and, " 'although the income may not go directly back to the NCAA, the funding may ultimately be paid from the member institution to the NCAA in membership dues or other fees.' " Pet. App. 30a (quoting Pl.'s Opp. Br. 6).

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[4] Smith also alleged that the NCAA's postbaccalaureate rule violates federal antitrust laws. The Court of Appeals affirmed dismissal of this claim, *see* Pet. App. 5a-12a, and this Court denied Smith's petition for certiorari seeking review of that ruling. No. 98-107 (Oct. 5, 1998). In addition, Smith brought a state law breach of contract claim; the District Court, however, declined to exercise supplemental jurisdiction over that claim after dismissing the federal counts. Pet. App. 34a.

The District Court dismissed Smith's complaint for failure to state a claim upon which relief could be granted. *Id.* 33a. The court agreed with the NCAA that Smith had failed adequately to allege that the NCAA is a recipient of federal financial assistance, the statutory predicate to Title IX coverage. *Id.* 31a. It further held that Smith "failed to state a claim under Title IX," even assuming that the NCAA's member institutions receive federal funds and such "funding may ultimately be paid from the member institution[s] to the NCAA in membership dues or other fees." *Id.* 32a. Such a " 'connection[]' with federal funding," the court explained, is "too far attenuated to qualify [the NCAA] as a recipient of federal funds thus subjected to the mandates of Title IX." *Id.*

Shortly after the District Court entered its order dismissing Smith's Title IX claim, Smith sought leave to amend her complaint to allege that " '[t]he NCAA is a recipient of federal funds because it is an entity which receives federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance.' " *Id.* 18a (quoting amended complaint).[5] But having already concluded that the "connection" by which Smith sought to prove that the NCAA was an indirect recipient of federal funds was too attenuated to trigger Title IX, the District Court denied Smith leave to amend. *Id.* 36a. Smith appealed.

The Third Circuit reinstated Smith's Title IX claim. According to the Court of Appeals, the District Court should have allowed the claim to proceed because Smith's proposed amendment "alleges that the NCAA receives dues from member institutions, which receive federal

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[5] The amended complaint also sought to add Hofstra and the University of Pittsburgh as defendants, and alleged that they are direct recipients of federal financial assistance and "enforced the decision to deny [Smith] eligibility." Am. Compl. ¶¶ 66-69.

funds." *Id.* 19a. "[T]his allegation," the court held, "would be sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds and would survive a motion to dismiss." *Id.*

In so holding, the Court of Appeals recognized that this Court had held in *Paralyzed Veterans* that Section 504 does *not* extend to entities which simply benefit from—as opposed to receive—federal aid, and also recognized that Section 504 "contains language *identical* to that of Title IX * * * regarding receipt of federal assistance." Pet. App. 14a (emphasis added). "Notwithstanding the parallel language of [Section 504] and Title IX," however, the Third Circuit declined to "apply the *Paralyzed Veterans* Court's definition of 'recipient' to Title IX." Pet. App. 15a. The sole reason the court gave for departing from *Paralyzed Veterans* was that the Title IX regulations "define[] a recipient as an entity 'which operates an educational program or activity which *receives or benefits*' from federal funds." *Id.* (quoting 34 C.F.R. § 106.2(h)) (emphasis in Court of Appeals opinion). That regulatory definition, the Third Circuit held, "require[d]" it to "reach a different result." *Id.*

Based on that reasoning, the Court of Appeals held that the fact "that the NCAA receives dues from its members which receive federal funds * * * would subject the NCAA to the requirements of Title IX," and accordingly ruled that Smith was entitled to proceed with her Title IX claim against the NCAA. *Id.* 16a. The Third Circuit denied the NCAA's petition for rehearing. *Id.* 39a. This Court granted certiorari.

SUMMARY OF ARGUMENT

I. The Third Circuit erred in holding that the NCAA is subject to Title IX because it receives payments from entities that receive federal financial assistance. The language, purpose, and "contractual nature" of Title IX as Spending Clause legislation plainly limit the statute's

reach to recipients of federal financial assistance. *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 118 S. Ct. at 1997-98. In *Paralyzed Veterans* this Court accordingly rejected the notion that federal coverage "follows the aid past the recipient to those who merely benefit from the aid." 477 U.S. at 607. Because the NCAA at most only indirectly benefits—in the form of dues—from the federal financial assistance received by others, it is not covered by Title IX. Nothing in the Title IX regulations compels a different conclusion and, in any event, those regulations may not be invoked to override the clear intent of Congress to limit federal coverage to recipients, or to circumvent this Court's decisions.

II. Nor is the NCAA covered by Title IX on the basis of its "relationship" with member institutions that are, as Smith has also argued. This Court already has repudiated the argument that entities may be covered by Title IX, "not because they had received federal financial assistance, but because they are 'inextricably intertwined' with an institution that has." *Paralyzed Veterans*, 477 U.S. at 610. Just last Term, moreover, the Court recognized that Title IX does not incorporate agency or vicarious liability principles. *Gebser*, 118 S. Ct. at 1996, 1999. That holding is compelled by Title IX's origin as Spending Clause legislation, and precludes extension of Title IX to the NCAA on the basis of any agency relationship it may have with members. Subsequent congressional action as well as agency interpretation of Title IX provides still more evidence that coverage does not extend to private entities—including private athletic associations—that do not themselves receive federal financial assistance, even if their members do.

III. Affirming the Third Circuit decision on either of these grounds would have broad implications beyond the NCAA and Title IX. Hundreds if not thousands of private membership organizations and associations receive no federal aid, but have members that do. If the NCAA

is covered by Title IX on the basis of its relationship with its members, all these entities would be subject to claims that they, too, are vicariously covered, regardless of whether they voluntarily and knowingly accepted coverage in exchange for federal aid. If, as the Third Circuit held, receipt of nominal payments from a federal funding recipient is sufficient to trigger coverage, then the implications of this case would be even broader: "the statutory 'limitation' on [federal] coverage would virtually disappear." *Paralyzed Veterans*, 477 U.S. at 609. Congress surely did not intend the program-specific statutes to reach this far, and as Spending Clause legislation they cannot.

ARGUMENT

I. THE NCAA IS NOT COVERED BY TITLE IX ON THE BASIS OF ITS RECEIPT OF PAYMENTS FROM ENTITIES THAT RECEIVE FEDERAL FINANCIAL ASSISTANCE.

A. The Language, Purpose, And Origin Of Title IX Limit Coverage To Recipients Of Federal Financial Assistance.

As with any statute, the starting point in determining the scope of Title IX is the language of the statute itself. *See Ardestani* v. *INS*, 502 U.S. 129, 135 (1991); *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 520 (1982). Title IX prohibits discrimination "on the basis of sex * * * under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). "[P]rogram or activity" is defined elsewhere in the statute to include the operations of certain government, education, and other entities. *See id.* § 1687, discussed *infra* at 30-31. But to come within Title IX's ambit, a covered program or activity must under the plain terms of the statute "receiv[e] Federal financial assistance." *Id.* § 1681(a). "At the outset, therefore, [the statute] requires [the Court] to identify the *recipient* of the federal assistance." *Paralyzed Veterans*, 477 U.S. at 604 (emphasis added).

This Court has consistently interpreted Title IX to mean what it says. *See Gebser*, 118 S. Ct. at 1997 ("Title IX focuses on * * * discriminatory practices carried out by recipients of federal funds."); *Grove City College* v. *Bell*, 465 U.S. 555, 570 n.20 (1984) ("Title IX coverage is triggered only when an 'education program or activity' is receiving federal aid."); *id.* at 577 (Title IX "make[s] unlawful 'discrimination' by recipients of federal financial assistance") (Powell, J., joined by Burger, C.J., and O'Connor, J., concurring); *Cannon v. University of Chicago*, 441 U.S. 677, 695 n.17 (1979) ("Title IX is applicable only to certain educational institutions receiving federal financial assistance"); *accord North Haven Bd. of Educ.*, 456 U.S. at 520-521. *Cf. Paralyzed Veterans*, 477 U.S. at 605 ("Congress limited the scope of § 504 [which has the same federal funding trigger as Title IX] to those who actually 'receive' federal financial assistance"). So have the lower courts. *See, e.g., Smith* v. *Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1018 (7th Cir. 1997) ("only a grant recipient can violate Title IX") (citing cases), *cert. denied*, 118 S. Ct. 2367 (1998); Pet. 17-20.

This plain meaning interpretation accords with other provisions of the statute, notably Title IX's enforcement provision. Section 1682 makes the "ultimate sanction for noncompliance" with Title IX "termination of federal funds or denial of future grants." *North Haven Bd. of Educ.*, 456 U.S. at 514-515. That sanction is meaningless unless the subject is a federal funding recipient to begin with. The interpretation also squares with one of the basic purposes of Title IX: " 'to avoid the use of *federal resources* to support discriminatory practices.' " *Gebser*, 118 S. Ct. at 1997 (quoting *Cannon*, 441 U.S. at 704) (emphasis added). And it comports with the statute's relatively sparse legislative history. *See* 118 Cong. Rec. 5803 (Feb. 28, 1972) ("heart" of Title IX is prohibition on "sex discrimination in educational programs receiving federal funds") (Sen. Bayh); *id.* at 5803-

15 (discussing discriminatory practices of institutions that clearly receive federal funds) (various members).[6]

This plain reading comes as no surprise; given its origin, Title IX could extend no further. As this Court resolved last Term, Title IX—like Title VI, the statute on which it was modeled—was enacted pursuant to Congress' spending power. *Gebser*, 118 S. Ct. at 1998. As Spending Clause legislation, Title IX "is not a regulatory measure, but an exercise of the unquestioned power of the Federal government to fix the terms on which Federal funds shall be disbursed." *Guardians Ass'n* v. *Civil Service Comm'n*, 463 U.S. 582, 599 (1983) (quotation omitted). Title IX thus "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser*, 118 S. Ct. at 1997. That "contractual framework," *id.*—the essence of Spending Clause legislation—limits Title IX's reach to entities that voluntarily and knowingly accept this "offer," *i.e.*, the actual recipients of federal aid. *See Pennhurst State Sch. & Hosp.* v. *Haldeman*, 451 U.S. 1, 17 (1981) (under Spending Clause, conditions on recipient of federal funds must allow contracting parties "to exercise their choice knowingly, cognizant of the consequences of their participation").

Because the NCAA does not itself receive federal financial assistance, it has never entered into the Title IX contract and accordingly is beyond the statute's intended and constitutionally permissible reach. The Third Circuit

[6] Title IX originated as a floor amendment to the Higher Education Amendments of 1972. "Senator Bayh's statements—which were made on the same day the amendment was passed, and some of which were prepared rather than spontaneous remarks—are [viewed as] the only authoritative indications of congressional intent regarding the scope of [Title IX]." *North Haven Bd. of Educ.*, 456 U.S. at 526-527.

sought to circumvent that conclusion by characterizing the NCAA as "a recipient of federal funds" on the basis of its receipt of "dues from member institutions, which receive federal funds." Pet. App. 19a. As we explain next, however, that reasoning defies the intent and purpose of Title IX's federal funding trigger, and was flatly rejected by this Court in *Paralyzed Veterans*.[7]

B. Title IX Does Not Extend To Entities That Merely Benefit From The Receipt Of Federal Financial Assistance By Others.

The question in *Paralyzed Veterans* was whether Section 504 of the Rehabilitation Act—which prohibits discrimination against disabled persons in any program or activity "receiving Federal financial assistance," 29 U.S.C. § 794—applies to commercial airlines. Airlines do not

[7] In her brief in opposition to certiorari, Smith asserted—as "an alternative basis for holding the NCAA subject to Title IX"—that an amicus brief filed in the Court of Appeals had argued that the NCAA is a "direct federal funding" recipient on the basis of a federal grant to the "National Youth Sports Program," a Missouri corporation, not the NCAA. Opp. 6. As we explained in our reply, however, the Court of Appeals does not consider issues raised only by amici. Reply to Opp. 4 n.3. In *her* Court of Appeals brief (p. 6), Smith asserted for the first time that the NCAA receives federal funds *indirectly* through the NYSP. But the Third Circuit "has consistently held that it will not consider issues that are raised for the first time on appeal," *Harris* v. *City of Philadelphia*, 35 F.3d 840, 845 (3d Cir. 1994), did not consider any argument involving the NYSP, and, in fact, it—like the District Court—never even alluded to the NYSP. Instead, the Court of Appeals held that the NCAA is subject to Title IX because it "receives dues from member institutions, which receive federal funds." Pet. App. 16a, 19a. The propriety of that ruling is the question on which this Court granted certiorari, Pet. i, and until or unless the Third Circuit decision below is set aside, there is no reason to consider any "alternative basis for holding the NCAA subject to Title IX." Opp. 7 n.2. *See Perry* v. *Thomas*, 482 U.S. 483, 492 (1987) ("alternative ground * * * does not prevent us from reviewing the ground exclusively relied upon by the courts below"); cases cited at Reply to Opp. 4 n.3.

receive federal aid, but airport operators do. 477 U.S. at 604-605. In arguing that Section 504 covers airlines, the plaintiffs in *Paralyzed Veterans* reasoned that "airlines are 'indirect recipients' of the aid to airports," because "airport operators convert the [aid] into runways and give the federal assistance—now in the form of a runway—to the airlines." *Id.* at 606. This Court disagreed, holding that "Section 504, *like Title IX* * * *, draws the line of federal regulatory coverage between the recipient and the beneficiary," and accordingly "covers those who receive the aid, but does not extend as far as those who benefit from it." *Id.* at 607, 610 (emphasis added).

The Third Circuit rationale for extending Title IX to the NCAA is foreclosed by *Paralyzed Veterans.* As this Court recognized in *Paralyzed Veterans,* Title IX and Section 504 contain the identical federal funding trigger, which is modeled on and has the same meaning as Title VI's trigger. *Id.* at 610.[8] Like the airlines in *Paralyzed Veterans,* the NCAA does not itself receive federal aid, and—at most—only indirectly benefits from aid received by members in the form of dues. Thus, under the rule of *Paralyzed Veterans,* the NCAA is—at most—an indirect beneficiary beyond Title IX's reach. The Third Circuit's

[8] *Paralyzed Veterans* expressly equates Section 504 with the other "program-specific statutes," including "Title IX," insofar as the federal funding trigger is concerned. 477 U.S. at 605. *See also Consolidated Rail Corp.* v. *Darrone,* 465 U.S. 624 (1984) (looking to prior interpretation of Title IX in construing identical language in Section 504). Numerous lower courts have recognized that the identical language in these laws has the same meaning. *See, e.g., United States* v. *Alabama,* 828 F.2d 1532, 1548 n.63 (11th Cir. 1987) ("Title IX * * * and section 504 of the Rehabilitation Act of 1973 were modeled after title VI and contain identical language. The Supreme Court has assumed the meaning of this program-specific language to be the *same* for all three statutes.") (emphasis added) (citing Supreme Court precedent), *cert. denied,* 487 U.S. 1210 (1988); *Doe* v. *Attorney General of United States,* 941 F.2d 780, 794 (9th Cir 1991); *Foss* v. *City of Chicago,* 817 F.2d 34, 36 n.1 (7th Cir. 1987). Smith does not assert otherwise.

contrary ruling violates the central teaching of *Paralyzed Veterans*: that federal coverage does not "follow[] the aid past the recipient to those who merely benefit from the aid." *Id.* at 607.

Smith claims that the fact that "the NCAA actually receives money from its federally funded member institutions in the form of dues * * * distinguishes this case from *Paralyzed Veterans,*" because airlines indirectly benefit from federal assistance only in the form of " 'non-money grants.' " Opp. 5-6 (quoting 477 U.S. at 606). But in *Paralyzed Veterans,* this Court specifically recognized that "federal financial assistance may take non-money form." 477 U.S. at 607-608 n.11. Thus, the pertinent inquiry in determining whether federal coverage exists is *not* whether the entity indirectly benefits in the form of money or nonmoney assistance, but rather—as the *Paralyzed Veterans* Court made clear in distinguishing *Grove City College* v. *Bell, supra*—whether the indirect beneficiary is an "intended recipient" of the aid in question. 477 U.S. at 607; *see id.* at 608 n.11.

In *Grove City* this Court held that colleges are covered by Title IX by virtue of their students' receipt of federal tuition grants. That holding, however, was explicitly based on "powerful evidence of Congress' intent" that colleges and universities are in fact the *intended* recipients of this aid, 465 U.S. at 569, including the "stated purpose[] of the student aid provisions * * * to 'provid[e] assistance to institutions of higher education.' " *Id.* at 566 (quoting statute); *see id.* at 565-570 (reviewing legislative record). Indeed, in light of this unmistakable legislative intent, the Department of Education requires colleges whose students receive financial aid to execute assurances—in the form of a contract—accepting federal coverage under Title IX. *Id.* at 560. *Grove City* simply stands for the proposition that an indirect *recipient* may be covered by Title IX when it is clear that Congress views that entity as a recipient of the financial aid.

This Court confirmed that reading of *Grove City* in *Paralyzed Veterans*, when it rejected essentially the same interpretation of *Grove City* advanced by Smith here:

> [Plaintiffs] also find support for their position in *Grove City*'s recognition that federal financial assistance could be either direct or indirect. This argument confuses intended *beneficiaries* with intended *recipients*. * * * While *Grove City* stands for the proposition that Title IX coverage extends to Congress' intended recipient, whether receiving the aid directly or indirectly, it does not stand for the proposition that federal coverage follows the aid past the recipient to those who merely benefit from the aid. [*Paralyzed Veterans*, 477 U.S. at 606-607 (emphasis in original).[9]]

In *Paralyzed Veterans* it was "clear that the [intended] recipients of the federal assistance extended by Congress under the [Airport] Trust Fund are the airport operators." *Id.* at 607. Thus, federal coverage began and ended with the operators; it did not "follow[] the aid past the [operators] to those who merely benefit from the aid." *Id.* Here, it is clear that the intended recipients of the federal aid in question—federal grants and other assistance programs available to colleges and universities, *see* note 2, *supra*—are the institutions that in fact receive the aid, and execute assurances agreeing to be covered. Indeed, in this case as in *Paralyzed Veterans*, there is no claim that *Congress* actually intended the alleged indirect beneficiary—here, the NCAA—to receive the money disbursed to other entities. 477 U.S. at 607.

[9] The *Grove City* Court went on to hold that a recipient's obligation to comply with Title IX extends only to the particular program or activity receiving federal aid; *e.g.*, in the case of Grove City College, the student financial aid program. 465 U.S. at 574. In 1987 Congress amended Title IX to establish coverage on an institution-wide rather than program-specific basis. *See* Civil Rights Restoration Act of 1987 ("CRRA"), codified in pertinent part at 20 U.S.C. § 1687. In doing so, however, Congress made clear that the CRRA left undisturbed the existing federal funding trigger—as interpreted in *Paralyzed Veterans*—for determining when an entity is covered in the first place. *See* S. Rep. No. 100-64, at 31 (1987) (CRRA does "not change in any way who is a recipient of federal financial assistance," and "does not overrule or alter the Supreme Court ruling in [*Paralyzed Veterans*]."); 55 Fed. Reg. 52136, 52138 (Dec. 19, 1990) (same); *infra* at 31-32.

In rejecting the indirect beneficiary rationale in *Paralyzed Veterans*, this Court recognized that Congress intended coverage under the program-specific statutes to be premised on the contract between the government and the intended recipient. As Justice Powell wrote for the Court, "[u]nder the program-specific statutes, Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipients' acceptance of the funds triggers coverage under the non-discrimination provision." 477 U.S. at 605. That is a *"quid pro quo* for the receipt of federal funds." *Id.* (quotation omitted). The Third Circuit decision disregards this fundamental contractual—and constitutionally grounded—limitation on Title IX's reach and, instead, gives the statute "almost limitless coverage." *Id.* at 608.

"Title IX's contractual nature" was the underpinning for this Court's decision last Term in *Gebser* v. *Lago Vista Independent School District*, 118 S. Ct. at 1998. In *Gebser* the Court held that a school district may not be held liable under Title IX for the acts of its teachers unless it "has actual notice of * * * the teacher's misconduct." *Id.* at 1993. In so holding, the Court emphasized that Title IX's "contractual framework" prohibits a court from imposing liability where "the receiving entity of federal funds [lacks] notice that it will be liable for a monetary award" for the acts in question. *Id.* at 1997, 1998 (quotation omitted). Extending federal coverage to entities that merely indirectly benefit from the federal aid received by others would obliterate this fundamental notice requirement because such indirect beneficiaries have

no reason to know they are covered; indeed, they are in no "position to accept or reject [the Title IX contract] as part of the decision whether or not to 'receive' federal funds." *Paralyzed Veterans*, 477 U.S. at 608.

Lack of notice is a basic constitutional impediment to Smith's position in this case. "The legitimacy of Congress' power to legislate under the spending power * * * rests on whether [the recipient of federal aid] voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a [recipient] is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst State School & Hosp.*, 451 U.S. at 17 (citations omitted). To satisfy this constitutional prerequisite, the Title IX regulations provide that every recipient of federal financial assistance must execute a written assurance agreeing to comply with Title IX. 34 C.F.R. § 106.4. The NCAA has never executed any such assurance on the basis of federal aid received by colleges and universities, or the NCAA's receipt of membership dues. In other words, like the airlines in *Paralyzed Veterans*, the NCAA never knowingly or voluntarily accepted the terms of the Spending Clause contract, and accordingly is not covered by Title IX.[10]

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[10] Other courts have faithfully applied this Court's decision in *Paralyzed Veterans* and limited the reach of the program-specific statutes to recipients of federal financial assistance. Thus, for example, in *Grzan* v. *Charter Hospital of Northwest Indiana*, 104 F.3d 116, 119-120 (7th Cir. 1997), the Seventh Circuit held that Section 504 does not cover employees of a direct recipient of federal aid, even though they receive payments—in the form of wages—from a federal funding recipient. In reaching this result, the Seventh Circuit specifically relied on *Paralyzed Veterans* for the proposition that "benefiting from a federally financed program, *even where the benefits are financial*, does not necessarily constitute the receipt of federal funding." *Id.* at 120 (emphasis added).

Gallagher v. *Croghan Colonial Bank*, 89 F.3d 275 (6th Cir. 1996), is to the same effect. The plaintiff in that case argued that a bank was subject to Section 504 because, although not a direct recipient of federal financial assistance, the bank "makes student loans which are subsidized and guaranteed with federal funds." *Id.* at 277. Following *Paralyzed Veterans*, the Sixth Circuit affirmed the dismissal of this claim on the ground that the bank was not covered by Section 504. As the court explained, federal coverage "does not follow federal aid past the intended recipient to those who merely derive a benefit from the aid or receive compensation for services rendered pursuant to a contractual arrangement." *Id.* at 278 (quotation omitted). *But see Moore* v. *Sun Bank*, 923 F.2d 1423, 1432 (11th Cir. 1991) (banks receiving federal default reimbursements on federally guaranteed loans are covered by Section 504).

C. The Title IX Regulations Provide No Basis For Disregarding The Clear Intent Of Congress Or Plain Import Of This Court's Decisions.

Although the Third Circuit recognized that Title IX contains the identical federal funding trigger as Section 504, it chose "not [to] apply the *Paralyzed Veterans* Court's definition of 'recipient' to Title IX" because it believed that an administrative regulation under Title IX compelled a different result. Pet. App. 15a. As the Court of Appeals put it, "the broad regulatory language under Title IX * * * defines a recipient as an entity 'which operates an educational program or activity which *receives or benefits*' from federal funds." *Id.* (quoting 34 C.F.R. § 106.2(h)) (emphasis in opinion).

The Third Circuit, however, omitted the pertinent and critical part of the regulatory definition—the clause immediately preceding the one it quoted in explaining its refusal to follow *Paralyzed Veterans*. In full, the Title IX regulations define "recipient" to include

> any public or private agency, institution or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient *and* which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee or transferee thereof. [34 C.F.R. § 106.2(h) (emphasis added).]

Contrary to the supposition of the Court of Appeals, it is not enough—even under the regulatory definition on which the Third Circuit relied to flank *Paralyzed Veterans*—that an entity "operates an education program or activity which receives or benefits from" federal funds for that entity to be covered under Title IX. *Id.* Instead, as the italicized "and" in the quoted text above unambiguously confirms, the entity itself must *also* be one "to whom Federal financial assistance is extended directly or through another recipient." *Id.* That of course is the issue in this case, and that issue is controlled by this Court's decision in *Paralyzed Veterans*.

The fact that the regulations contemplate the receipt of federal funds "through another recipient" simply reflects the lesson of *Grove City*: "Title IX coverage extends to Congress' *intended* recipient, whether receiving the aid directly or indirectly." *Paralyzed Veterans*, 477 U.S. at 607 (emphasis added) (explaining *Grove City*). While "[i]t was clear in *Grove City* that Congress' intended recipient was the college," *id.* at 606-607, there is no indication (or assertion) that the NCAA is the intended recipient of the federal aid disbursed to colleges, nearly all of which is earmarked for non-athletic uses such as student aid and scientific research. In *Grove City*, moreover, it was evident that students were acting as "mere conduits of the aid to its intended recipient." *Id.* at 607. Colleges and universities, by contrast, in no way act as "mere conduits" for funneling federal money to the NCAA; indeed, doing so would doubtless violate the terms on which the aid was extended to the *institutions*.[11]

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11 *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (6th Cir. 1996), further illustrates the narrow circumstances in which the indirect receipt of federal aid may trigger coverage. In that case, the Sixth Circuit held that a railroad was subject to Section 504, where the railroad "receives government money for the improvement of railroad crossings," which it then "owns." *Id.* at 786-787. The railroad argued that under *Paralyzed Veterans* federal law was not triggered because, pursuant to the federal grant program at issue, funds are distributed first to the states and then to railroads. *Id.* at 787. But, as the Sixth Circuit explained, the railroads were plainly the intended recipients of the federal funds and, thus, were required to execute "an express promise to comply with the nondiscrimination regulations for federally assisted programs." *Id. Cf. Bentley* v. *Cleveland Cty. Bd. of Cty. Comm'rs*, 41 F.3d 600, 604 (10th Cir. 1994) (county's receipt of federal funds from state government triggered Section 504); *Dunlap* v. *Association of Bay Area Gov'ts*, 996 F. Supp. 962, 968 (N.D. Cal. 1998) ("An entity has been held to be an 'indirect recipient' only where that entity received funding that was funneled from the federal government through the state") (quoting *Paralyzed Veterans*, 477 U.S. at 609).

Nor does the regulation's "or benefits from" language supply any basis for subjecting the NCAA to Title IX. That language was adopted before this Court's decision in *Paralyzed Veterans* and must be read in light of this Court's holding in that case: Title IX and the other program-specific statutes "cover[] those who receive the aid, but do[] not extend as far as those who *benefit* from it." 477 U.S. at 607 (emphasis added). Thus, whatever the continuing effect of the "benefits from" language in the Title IX regulations, it does not bring within Title IX entities such as the airlines in *Paralyzed Veterans* or the NCAA here that only indirectly benefit (if at all) from federal aid received by others.

In the wake of *Paralyzed Veterans*, affected agencies duly amended their Section 504 regulations to "delete[] the phrase 'or benefiting from' [federal financial assistance]." 55 Fed. Reg. at 52138. As they explained, this change was necessitated by *Paralyzed Veterans*, "which held that air transportation services provided by airlines were not part of the covered program or activity because the airlines were not the intended recipient of the Federal financial assistance to airports, even if airlines benefited from that assistance." *Id.* The parallel "or benefits from" language was not deleted from the corresponding Title IX regulations (*i.e.*, 34 C.F.R. § 106.2(h)), but the Third

Circuit erred in giving effect to that vestigial language in an effort to bypass this Court's interpretation of the identical federal funding trigger in *Paralyzed Veterans*.

The Third Circuit's reliance on the regulation's definition of recipient to disregard "the *Paralyzed Veterans* Court's definition of 'recipient' " was error for an even more basic reason. Pet. App. 15a. The Third Circuit refused to heed the rule of *Paralyzed Veterans* because, in its view, doing so would render the Title IX regulation a "nullity." *Id.* 16a. But regulations fall if they are inconsistent with Supreme Court precedent, not the other way around. In *Paralyzed Veterans* this Court construed what the Third Circuit itself acknowledged was statutory "language identical to that of Title IX," contained in a statute (Section 504) modeled on the same provision as Title IX —*i.e.*, Title VI. Pet. App. 14a. That statutory interpretation was binding on the Third Circuit, just as it is binding on the agency charged with administering Title IX. *See Neal* v. *United States*, 516 U.S. 284, 295 (1996) ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law.").

II. THE NCAA IS NOT COVERED BY TITLE IX ON THE BASIS OF ITS RELATIONSHIP WITH MEMBER INSTITUTIONS THAT ARE.

As an alternative ground for circumventing *Paralyzed Veterans* and affirming the Third Circuit decision, Smith argues that the NCAA is covered by Title IX on the basis of the "*relationship* between the NCAA and its member institutions." Opp. 9 (emphasis added). This argument is different from the indirect beneficiary rationale relied upon by the Third Circuit, because it does not depend on the NCAA's receipt of payments from a federal funding recipient, in the form of dues or otherwise. Instead, the argument is based on the quite different notion that because most colleges and universities are covered by Title IX, the NCAA—due to its "relationship" with those institutions—must be vicariously covered, too. For several reasons, this argument also fails.

A. The NCAA Is No Mere "Surrogate" For Its Members.

To begin with, the argument's central factual premise is unfounded. Smith claims that "[t]here is no real distinction between the NCAA and its member institutions," and that the NCAA is merely a "surrogate" for its members. Opp. 9. But the NCAA constitution draws clear lines between the organization and member institutions. Thus, while the constitution authorizes the organization to adopt rules governing intercollegiate athletics, it states that "[t]he control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself." NCAA const. art. 6.01.1. As courts have recognized, moreover, "[t]he NCAA's interests are * * * not coterminous with or identical to the broader interests of all or any of its institutional members." *NCAA v. Califano*, 444 F. Supp. 425, 433 (D. Kan. 1978), *rev'd on other grounds*, 622 F.2d 1382 (10th Cir. 1980); *see* Pet. 21 n.13.

The NCAA's mission obviously relates to that of its members, at least insofar as intercollegiate athletics is concerned. But the NCAA acts foremost with *its* distinct mission in mind—"maintenance of [the] revered tradition of amateurism in college sports." *NCAA* v. *Board of Regents of Univ. of Okla.*, 468 U.S. at 120. As a result, the NCAA often adopts rules that are opposed by individual institutions, and is required to take enforcement actions over the opposition of individual members, for the collective good. The *Tarkanian* case vividly illustrates the point; there, this Court aptly characterized the NCAA and one of its members as "antagonists, not joint partici-

pants." 488 U.S. at 197 n.16. The duty of the NCAA is to "serve[] the common need of member institutions for regulation of athletics while correlating their diverse interests." *Arlosoroff* v. *NCAA*, 746 F.2d at 1022. In attempting to fulfill that duty in the increasingly complex world of intercollegiate athletics, the NCAA is by no means a mere "surrogate" for its members.

B. *Paralyzed Veterans* Repudiates The "Relationship" Rationale For Extending Federal Coverage Beyond Recipients Of Federal Financial Assistance.

In any event, this Court has already repudiated the relationship rationale for extending federal coverage. In *Paralyzed Veterans* the Court squarely rejected the argument—directly analogous to the one Smith advances here—that the airlines were covered by Section 504, "not because they had received federal financial assistance, but because they are 'inextricably intertwined' with an institution that has." 477 U.S. at 610. *See Dunlap* v. *Association of Bay Area Govt's*, 996 F. Supp. at 968 (entities "that are 'inextricably intertwined' with actual recipients, are *not* on that basis covered") (citing *Paralyzed Veterans*, 477 U.S. at 607-610; emphasis added).[12] As the *Paralyzed Veterans* Court put it, this reasoning is "overbroad and unpersuasive." 477 U.S. at 160. It is no more availing today than it was back then.

Compelling jurisprudential considerations support this Court's ruling. As this Court has recognized, threshold jurisdictional determinations—such as whether a particular entity or program is covered by the program-specific

[12] In *Paralyzed Veterans* the plaintiffs argued that airlines are "inextricably intertwined" with airports, and that the "indissoluble nexus" between them is "commercial air transportation." 477 U.S. at 610. The argument in this case is that the NCAA is inextricably intertwined with member institutions, and that the indissoluble nexus between them is intercollegiate athletics.

antidiscrimination laws—should not depend upon fact-specific inquiries that are "hard to apply," "jettison[] relative predictability for the open-ended rough-and-tumble of factors," and "invite[] complex argument in a trial court and a virtually inevitable appeal." *Grubart* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). *Accord Sisson* v. *Ruby*, 497 U.S. 358, 364 n.2 (1990); *Burnham* v. *Superior Court of Cal.*, 495 U.S. 604, 626 (1990) (plurality opinion). The relationship approach to the federal coverage determination under Title IX suffers from each of these flaws.

Indeed, the difficulty that courts have experienced in determining whether the NCAA is a state actor due to its relationship with members that are state agents bespeaks the complexity and unpredictability of this undertaking. *See NCAA* v. *Tarkanian*, 488 U.S. at 182 n.5 (detailing lower court struggle).[13] The potential permutations on this theme are myriad. Scores of associations and other entities—most or all of which are distinguishable from one another in some respect relating to organizational form, internal relations, or membership—are affiliated with higher education entities that receive federal funds, but do not themselves receive federal aid. *See* Appendix, *infra*. Determining whether these entities are covered by the program-specific laws under the "relationship" rationale would require the development of an entirely new

[13] In *Tarkanian* this Court held that the NCAA was not a state actor for purposes of its investigation and enforcement action against the basketball coach at one particular state school. In doing so, it reversed a state high court ruling that the NCAA is a state actor, which was based in part on the premise that because "'many NCAA member institutions were either public or government supported,'" the NCAA must be a public entity, too. 488 U.S. at 190 (quoting lower court decision). As the *Tarkanian* Court recognized, the lower courts are split on whether the NCAA is a state actor for general purposes. *Id.* at 182 n.5. There is no claim in this case that the NCAA is a state actor.

jurisprudence concerning what is a sufficient inter-relationship to trigger federal coverage. At the end of the day, that determination would no doubt turn on the facts and circumstances of the alleged relationship in each particular case. There is no inkling that Congress intended to subject the federal coverage determination to such a cumbersome and unpredictable regime.

All indications are to the contrary. As discussed, the language, purpose, and origin of Title IX and the other program-specific statutes make clear that Congress intended to link coverage to the receipt of federal funding. That determination should always be straightforward because recipients of federal funding—even intended recipients that receive funding through another entity, such as the college in *Grove City*—must execute a written assurance accepting coverage. *See* 34 C.F.R. § 106.4; *supra* at 16. That assurance is vital because "[t]he legitimacy of Congress' power to legislate under the spending power * * * rests on whether [the recipient] voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State School & Hosp.*, 451 U.S. at 17 (citations omitted). An indeterminate relationship approach would extend federal coverage on an ad hoc basis to entities that have never "voluntarily and knowingly" entered into a Spending Clause contract, in clear conflict with Congress' intent in enacting Title IX and this Court's Spending Clause jurisprudence.

C. Title IX Coverage May Not Be Extended On The Basis Of Agency Or Vicarious Liability Principles.

Smith attempts to distinguish *Paralyzed Veterans* by arguing that the NCAA is "an agent of its member institutions," Opp. 7, whereas "[t]he airlines in [*Paralyzed Veterans*] were not agents of the airport." *Id.* 9. Neither the alleged relationship in this case nor the one in *Paralyzed Veterans* is readily pigeonholed as a matter of agency law. But even if this asserted distinction were

valid, it would make no difference with respect to the coverage determination under Title IX. Indeed, just last Term this Court rejected the argument that Title IX liability may be expanded by "application of agency principles." *Gebser*, 118 S. Ct. 1996, 1999.[14] The question in *Gebser* was whether a federal funding recipient is liable under Title IX for acts of its agents (in *Gebser*, a teacher). The Court answered this question in the negative, holding that—in view of Title IX's "contractual nature"—Title IX liability may not be expanded "on principles of vicarious liability." *Id.* at 1997-98.

If the liability of an entity plainly covered by Title IX may not be enlarged on the basis of agency or vicarious liability principles, then surely those principles may not be invoked to extend Title IX to entities not covered in the first place. Indeed, if the NCAA were properly viewed as an "agent" of its members, then its relationship with federal funding recipients would at most be akin to that between the institution defendant and teacher in *Gebser*.[15]

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[14] The petitioners in *Gebser*—supported by the United States as amicus curiae—argued that Title IX incorporates the same principles of agency law developed under Title VII. *See* Pet. Br. in No. 96-1866, at 15-17; U.S. Br. in No. 96-1866, at 9 ("Agency principles apply in Title IX cases in much the same manner as in Title VII cases"); *id.* 12-18 (same). This argument was based in part on the premise that Title IX, like Title VII, was enacted pursuant to Section 5 of the Fourteenth Amendment, not the Spending Clause. *See* U.S. Br. 23 n.16. In *Gebser*, however, this Court resolved any doubt that Title IX was enacted pursuant to Congress' spending power, and held that Title IX's "contractual framework distinguishes [it] from Title VII." 118 S. Ct. at 1997. In addition, the Court explained that because Title IX, unlike Title VII, contains no reference to "agents," there is no statutory basis for importing agency principles into Title IX. *See id.* at 1995-96.

[15] In *Gebser* the United States argued that the teacher was an agent of and "'stands in the shoes' of the school." U.S. Br. in No. 96-1866, at 14 (quoting administrative policy guidance). Here, Smith argues that the NCAA is an agent of and "stands in the shoes of its member institutions." Opp. 8 n.4.

As the vast majority of courts have recognized, however, Title IX provides no right of action against employees or other agents of federal funding recipients. *See Smith* v. *Metropolitan Sch. Dist.*, 128 F.3d at 1018-19 & n.1 (collecting cases); note 10, *supra*. That conclusion is compelled by the clear intent of Congress to limit Title IX coverage to recipients, and is unassailable in the wake of this Court's ruling in *Gebser* that Title IX does not incorporate agency or vicarious liability principles. It precludes extension of Title IX to the NCAA on the basis of any agency theory derived from its relationship with members that receive federal aid.

D. Subsequent Legislative Activity Confirms That Title IX Does Not Cover Private Entities On The Basis Of A Member's Receipt Of Federal Financial Assistance.

Subsequent legislative activity provides further evidence that Title IX does not cover private organizations on the basis of a member's receipt of federal aid. In 1984, for example, Senator Kennedy introduced a bill (S. 2568) that would have amended Title IX and the other program-specific statutes by deleting the term "program or activity" and replacing it with "recipient," which the bill defined as:

> any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit [thereof]) * * * to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits. [130 Cong. Rec. S9258 (Apr. 12, 1984).]

S. 2568's stated purpose was to overturn this Court's holding in *Grove City* that Title IX only applies to the specific "program or activity" receiving federal assistance, not institution-wide. *Id.* S9265. But the bill was tabled

after members of Congress, the Department of Justice ("DOJ"), and private groups voiced concerns that the bill—and particularly its open-ended recipient language—"goes far beyond title IX law prior to [*Grove City*]," and "extends coverage for the first time to State and local entities that actually receive no Federal financial assistance." *Id.* S27465, S274479 (Sept. 27, 1984) (Sen. Hatch); *id.* 27467 (DOJ statement). *See* 130 Cong. Rec. S27466 (Sept. 27, 1984) ("The definition of 'recipient' in S. 2568 is unclear and could extend the reach of the [program-specific] statutes to an organization which does not itself receive federal financial assistance.") (U.S. Catholic Conference).[16] The rejection of S. 2568 "militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 199-200 (1974).

In 1987 Congress passed the CRRA, Pub. L. No. 100-259, codified in pertinent part at 20 U.S.C. § 1687. The CRRA was a direct response to *Grove City*, and thus took a "very different" approach from that of S. 2568.

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[16] *See also* 130 Cong. Rec. S27466 (Sept. 27, 1984) ("We are concerned that the proposed legislation may extend the force and coverage of the civil rights laws far beyond their original scope.") (excerpt of statement from the National Association of Counties); *id.* (S. 2568 has "utter disregard * * * for the lines that have traditionally marked the boundaries between the public and private sectors") (National Association of Independent Colleges and Universities); *id.* S27467 ("The 'recipient' definition's reliance on an indirect benefit theory brings within its reach every imaginable kind of private or local governmental activity.") (American Association of Presidents of Independent Colleges and Universities); *id.* ("This legislation defines a 'recipient' of federal funds and it does so in such a broad way as to include just about everyone in the United States") (Citizens for Educational Freedom); *id.* (S. 2568 would make "just about everybody and everything a 'recipient' of indirect federal financial assistance") (American Association of Christian Schools); *id.* S27479 (S. 2568 "extends coverage for the first time to State and local entities that actually receive no Federal financial assistance") (Sen. Hatch).

S. Rep. No. 100-64, at 6. Rather than attempt to expand the class of entities covered by Title IX and the other program-specific statutes, it simply added a proviso to each of these statutes defining "program or activity" to make clear that if an entity receives federal financial assistance, coverage applies to that entity's activities "institution-wide." *Id.*; *see id.* at 18 ("The definition of 'program or activity' and 'program' contained in the bill describe the application of the principle of institution-wide coverage to the public and private entities which are recipients of federal financial assistance.").

To trigger institution-wide coverage under the CRRA, an entity—even an "entity which is established by two or more [covered] entities"—must itself be "extended Federal financial assistance." 20 U.S.C. § 1687. But if any part of an entity receives such assistance, then "all of [the entity's] operations" are covered. *Id.* In pertinent part, the CRRA provides:

> For the purpose of this chapter, the term "program or activity" and "program" mean all of the operations of—
>
> * * * *
>
> (2)(A) a college, university, or other post-secondary institution, or a public system of higher education; or
>
> * * * *
>
> (3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—
>
> (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
>
> (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
>
> * * * *

> (4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);
>
> *any part of which is extended Federal financial assistance* * * *. [*Id.* (emphasis added).]

The operations of the NCAA do not constitute a "program or activity" within the meaning of the CRRA because no part of the NCAA—not the NCAA executive committee, not the NCAA rules committee, and not any other part of the NCAA itself—receives federal aid. The Committee Report accompanying the CRRA confirms this reading, and provides still more evidence that Congress did not intend Title IX to cover private organizations on the basis of a related (but distinct) entity's receipt of federal aid. It states: "For example, in a Catholic diocese where 3 parishes receive federal aid, the parishes are geographically separate facilities which receive federal aid, and the diocese is a corporation or private organization of which the parishes are a part. *Only the three parishes which receive federal aid are covered by the antidiscrimination laws.*" S. Rep. No. 100-64, at 21-22 (emphasis added). By analogy, the NCAA is a private organization whose member institutions receive federal aid. Only the institutions that receive federal aid are covered by Title IX; the NCAA—like the diocese—does not itself receive such aid, and so is not covered.

A contrary conclusion would significantly expand the definition of what a covered recipient is in the first place, bringing a broad new class of private entities within the statute's reach. *See infra* at 35-36. Yet in passing the CRRA, Congress took pains to make clear that the Act "addresses only the scope of coverage under [the program-specific statutes] of *recipients of federal financial assistance*," that it does "not change in any way who is a recipient of federal financial assistance," and that it "does not overrule or alter the Supreme Court ruling in [*Paralyzed Veterans*]." S. Rep. No. 100-64, at 30-31 (em-

phasis added); *accord* 134 Cong. Rec. S2735 (Mar. 22, 1988) (Sen. Rudman); *id.* H567, H577, H583 (May 2, 1988) (Reps. Hawkins, Fish, and Edwards). In fact, Congress made express that "[n]othing in the [CRRA] shall be construed to extend [coverage] to ultimate beneficiaries of federal financial assistance excluded from coverage before the [CRRA's] enactment," CRRA, § 7, 102 Stat. 31; thus, as one senator observed during the debate on the Act, "an organization will not be deemed to be receiving Federal financial assistance merely because one of its members, customers or clients receives some Federal benefit." 134 Cong. Rec. S2735 (Mar. 22, 1988) (Sen. Rudman).

E. The Title IX Regulations And Prior Agency Interpretations Make Clear That Title IX Does Not Extend To Private Athletic Associations.

The Title IX regulations also refute Smith's claim. On the particular issue of athletics, the regulations are addressed exclusively to "interscholastic, intercollegiate, club or intramural athletics offered by a *recipient*," which the regulations plainly treat as an educational institution. 34 C.F.R. § 106.41(a) (emphasis added).[17] Moreover, the regulations state that a recipient's duty to comply with Title IX "is not obviated or alleviated by any rule or regulation of any * * * athletic or other league, or association" to which it belongs. *Id.* § 106.6(c). The obvious negative pregnant is that athletic associations—including the NCAA, the Nation's foremost private athletic association—that do not receive federal financial assistance are not covered by Title IX, even if their members are.[18]

[17] The Department of Health, Education, and Welfare ("HEW")—delegated by Congress the responsibility for implementing Title IX, 20 U.S.C. § 1682—issued Title IX regulations in 1975. HEW later issued a "proposed policy interpretation" on Title IX and intercollegiate athletics. *See* 43 Fed. Reg. 58070-75 (Dec. 11, 1978). That policy interpretation also makes clear that the Title IX regulations only apply to "*recipients* who operate or sponsor * * * athletics," and, like the regulations, is clearly addressed to educational institutions. *Id.* at 58070 (emphasis added).

That is the precise position that the agency took in *NCAA* v. *Califano*, 622 F.2d 1382 (10th Cir. 1980). *Califano* involved a facial challenge by the NCAA to the Title IX regulations. The agency moved to dismiss the suit, arguing that the NCAA—not being a federal funding recipient—lacked standing to challenge the Title IX regulations. The district court agreed, explaining that the "administrative provisions in question exert no direct regulatory effect upon the NCAA" because it "receives no federal financial assistance," and the regulations—like the statute itself—"apply only to 'recipients' of federal financial assistance." 444 F. Supp. 425, 430-431 (D. Kan. 1978). While reversing on other grounds, the Tenth Circuit agreed that the NCAA lacked standing to proceed on its own behalf, reiterating that the Title IX "regulations can only be read to apply to the member colleges and *not to the NCAA itself*." 622 F.2d at 1387 (emphasis added).

In its Tenth Circuit brief in the *Califano* case, the agency made its position perfectly clear: "The [Title IX] regulation applies to actions of colleges receiving federal

[18] After the rule in Section 106.6(c) was adopted, "colleges and universities" expressed concern that the rules of intercollegiate athletic associations could "plac[e] the institutions in a posture of noncompliance with Title IX." *See* 44 Fed. Reg. 71413, 71422 (Dec. 11, 1979). Despite acknowledging that "violation of intercollegiate athletic rules can have a severe effect on the athletic opportunities within an affected program," HEW refused to modify the provision. *Id.* As it explained, athletic association "rules do not prohibit choices that would result in compliance with Title IX," and, in any event, "[s]ince all (or virtually all) association member institutions are subject to Title IX, the opportunity exists for these institutions to resolve collectively any wide-spread Title IX compliance problems resulting from association rules." *Id.* Tellingly absent from the agency's comments is any suggestion that Title IX applies to the athletic associations themselves.

funds, *and in no way applies to private athletic associations.*" Br. for Appellee Sec'y of HEW, 10th Cir. No. 78-1632 ("HEW Br.") at 13-14 (emphasis added). In a footnote to this statement, the agency added: "HEW's regulation states that compliance by colleges is not excused by observing any inconsistent rules of an athletic association, 86.6(c), *but does not require the latter to change their rules.*" *Id.* 14 n.7 (emphasis added). That agency position follows inexorably from the language, purpose, and origin of Title IX, squares with this Court's decisions interpreting Title IX and the other program-specific statutes, and compels the conclusion that the NCAA—the private athletic association to which the agency's statement was directed in *Califano*—is not covered by Title IX.[19]

As a last-ditch effort, Smith claims that unless Title IX is extended to the NCAA, "educational institutions could attempt to do indirectly through the NCAA that which they are prohibited from doing under Title IX directly." Opp. 9.[20] As Smith herself is quick to point out, however,

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[19] Prior to *Califano*, HEW had apparently taken the view that Title IX could extend to state high school athletic associations. *See* NCAA Reply Br., 10th Cir. No. 78-1632 (appending letters from HEW to the Virginia High School League, the California Department of Education, and the Alabama State Athletic Association). These associations are not "private," but instead appear to be creatures of state law. In that regard, they are analogous to the association in *Horner* v. *Kentucky High School Athletic Ass'n*, 43 F.3d 265, 268-269 (6th Cir. 1994) (quoting statute), which was charged by state law "'to manage interscholastic athletics at the high school level'" on behalf of the state board of education—an entity which operates programs receiving hundreds of millions of dollars in federal funds. *See* Pet. 20-21 (discussing *Horner*).

[20] This argument rests on the suggestion that the NCAA is a "subterfuge" designed to circumvent Title IX. Opp. 9. But the NCAA was founded nearly 70 years *before* Title IX, and assumed its "critical role" in governing intercollegiate athletics long before that statute was passed. *NCAA* v. *Board of Regents of Univ. of Okla.*, 468 U.S. at 120.

colleges and universities subject to Title IX are not excused from the statute's mandate on the ground that they are following NCAA rules or decisions. *See* Opp. 10 n.5 (citing 34 C.F.R. § 106.6(c)); note 18, *supra*. In any event, even if this Court believed a different regime were preferable, it would of course not be free to disregard the clear intent of Congress to limit federal coverage to recipients of federal aid.

III. ADOPTING THE INDIRECT BENEFICIARY OR RELATIONSHIP RATIONALE FOR EXTENDING FEDERAL COVERAGE WOULD HAVE BROAD IMPLICATIONS BEYOND THE NCAA AND TITLE IX.

The Court need go no further to decide this case. But it is nevertheless important to recognize that adopting either the relationship or indirect beneficiary rationale to extend Title IX to the NCAA would have broad implications beyond the NCAA and even Title IX. In addition to the NCAA, there are hundreds if not thousands of private organizations and associations that do not themselves receive federal financial assistance, but have members—including colleges and universities, hospitals, and public contractors—that do. *See* Appendix, *infra*. If the NCAA were subject to Title IX by virtue of its relationship with members, then these organizations, too, would be subject to claims that they are vicariously covered based on their relationship with federal funding recipients. Title IX coverage would be limited to "any education program or activity," 20 U.S.C. § 1681(a), but all other activities of such membership organizations would be subject to the other program-specific statutes with the same federal funding trigger—Title VI, Section 504, and the Age Discrimination Act—which are not by their terms limited to education or any particular field. *See* note 1, *supra*.

The potential implications of the Third Circuit indirect beneficiary rationale are even broader. If, as the Third Circuit held, the NCAA's receipt of nominal payments from members is itself sufficient to trigger Title IX, then the program-specific statutes would cover virtually *any* individual or entity that receives payments from—and, thus, under the Third Circuit rationale, "benefits from"—an entity that, in turn, receives federal assistance. In the case of a college or university alone that would exponentially expand the scope of federal coverage from the institution that actually receives federal funds to anyone doing business with it—contractors, businesses, employees, and countless others. In other words, "the statutory 'limitation' on [federal] coverage would virtually disappear, a result Congress surely did not intend." *Paralyzed Veterans*, 477 U.S. at 609.

This has enormous practical consequences for entities such as the NCAA that—because they do not receive federal assistance—have never agreed to be covered by Title IX in exchange for federal funds. As Congress has recognized, "when we expand Federal jurisdiction under [the program-specific statutes], we expand the burdens accompanying them—paperwork, on-site compliance reviews, affirmative action requirements and much more." 134 Cong. Rec. S2396 (Mar. 17, 1988) (Sen. Hatch). *See id.* S2402 (DOJ letter detailing administrative requirements).[21] That does not include the costs of defending against "expensive, vexatious litigation" brought under these laws. *Cannon* v. *University of Chicago*, 441 U.S. at

[21] For example, the Title IX regulations require recipients to designate an employee responsible for ensuring compliance with Title IX, 34 C.F.R. § 106.8; follow extensive recordkeeping and reporting requirements, *id.* § 100.6(b); open their "books, records, accounts, and other sources of information, and [their] facilities" to regulatory officials, *id.* § 100.6(c); and submit to periodic on-site compliance reviews, *id.* § 100.7, as well as full-blown investigations and enforcement actions, *id.* § 100.8. *See id.* § 106.71 (incorporating by reference *id.* §§ 100.6-100.11).

747 (Powell, J., dissenting). One may applaud the ends of the program-specific antidiscrimination laws without coveting the administrative burdens and expenses that accompany federal coverage.

As we have explained, it is clear Congress never intended Title IX to extend this far. Neither the Third Circuit nor Smith has pointed to any concrete evidence to the contrary. Instead, for the purpose of extending Title IX to the NCAA, they rely on the attenuated indirect beneficiary and relationship rationales—proxies that are contradicted by the statute and this Court's decisions, that would sweep within the statute's reach a broad new class of private entities that do not receive federal aid, and that would subject those entities to an extensive regulatory regime intended only for federal funding recipients that have knowingly and voluntarily entered into the Spending Clause contract. The Court should reject those proxies here, and reaffirm that Title IX is limited to entities that in fact "receiv[e] Federal financial assistance," 20 U.S.C. § 1681(a), just like the statute says.

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Illustrative List Of Membership Organizations That Include Higher Education Institutions Among Their Ranks

Academic Resource Network
American Assembly of Collegiate Schools of Business
American Association for Employment in Education
American Association of Christian Schools
American Association of Colleges for Teacher Education
American Association of Colleges of Nursing
American Association of Colleges of Osteopathic Medicine
American Association of Community Colleges
American Association of Dental Schools
American Association of State Colleges and Universities
American Association of Teachers of Turkic Languages
American Council on Schools and Colleges
American Debate Association
American Institute of Indian Studies
American Mathematical Association of Two Year Colleges
Associated Colleges of the Midwest
Association for Continuing Higher Education
Association for Episcopal Colleges
Association for Gerontology of Higher Education
Association for Library and Information Science Education
Association for Media-Based Continuing Education for Engineers
Association for Theatre in Higher Education
Association of American Colleges and Universities
Association of American Law Schools
Association of American Medical Colleges
Association of American Universities
Association of Catholic Colleges and Universities
Association of Christian Schools International
Association of College Unions International
Association of Collegiate Business Schools and Programs

Association of Collegiate Schools of Architecture
Association of Collegiate Schools of Planning
Association of Community College Trustees
Association of Graduate Liberal Studies Programs
Association of Independent Colleges of Art and Design
Association of Jesuit Colleges and Universities
Association of Mercy Colleges
Association of Military Colleges and Schools of the United States
Association of Minority Health Professions Schools
Association of Presbyterian Colleges and Universities
Association of Professional Schools of International Affairs
Association of Schools of Allied Health Professions
Association of Schools of Journalism and Mass Communication
Association of Southern Baptist Colleges and Schools
Association of Theological Schools in the United States and Canada
Association of University Programs in Health Administration
Association of University Summer Sessions
Broadcast Education Association
Career College Association
Christian College Consortium
Christian Schools International
Coalition for Christian Colleges and Universities
Coalition of Higher Education Assistance Organizations
College and University Personnel Association
Colleges of Mid-America
Community Colleges for International Development
Consortium on Financing Higher Education
Council for Advancement and Support of Education
Council for European Studies
Council of Colleges of Arts and Sciences
Council of Graduate Schools
Council of Independent Colleges
Council on Mennonite Colleges
Graduate Management Admission Council
Great Lakes Colleges Association

Higher Education Consortium for Urban Affairs
Independent Schools Association of the Central States
Institute for the International Education of Students
Inter-American College Association
International Association for Continuing Education and Training
International Association for Management Education
International Christian Accrediting Association
International Council on Education for Teaching
International University Consortium
Interuniversity Communications Council
Journalism Association of Community Colleges
Law School Admission Council
League for Innovation in the Community College
Lutheran Educational Conference in North America
Middle States Association of Colleges and Schools
National Association for Business Teacher Education
National Association for Equal Opportunity in Higher Education
National Association for Law Placement
National Association of Colleges and Teachers of Agriculture
National Association of Episcopal Schools
National Association of Federally Impacted Schools
National Association of Health Career Schools
National Association of Independent Colleges and Universities
National Association of Private, Nontraditional Schools and Colleges
National Association of Schools and Colleges of the United Methodist Church
National Association of Schools of Art and Design
National Association of Schools of Dance
National Association of Schools of Music
National Association of Schools of Theatre
National Association of State Approved Colleges and Universities
National Association of State Universities and Land-Grant Colleges

National Association of Substance Abuse Trainers and Educators
National Catholic Educational Association
National Collegiate Honors Council
National Commission for Cooperative Education
National Consortium for Black Professional Development
National Consortium of Arts and Letters for Historically Black Colleges and Universities
National Consortium of Educational Access
National Council of Educational Opportunity Associations
National Council on Religion and Public Education
National Forensic Association
National Guild of Community Schools of the Arts
National Registration Center for Study Abroad
National Student Exchange
New England Association of Schools and Colleges
North Central Association of Colleges and Schools
Northwest Association of Schools and Colleges
Northwest Association of Schools and Colleges Commission on Schools
Pennsylvania Association of Colleges and Universities
Public Leadership Education Network
Southern Association of Colleges and Schools
The College Board
Transnational Association of Christian Colleges and Schools
University and College Designers Association
University Continuing Education Association
University Risk Management and Insurance Association
University/Resident Theatre Association
Western Association of Schools and Colleges
Women's College Coalition
World Congress of Teachers of Dancing
World University Colleges Consortium

Sources: 1 *Encyclopedia of Associations* (Christian Maurer & Tara E. Sheets, eds. 34th ed. 1998); Higher Education Publications, Inc., *1998 Higher Education Directory* (1997).

STATUTORY AND REGULATORY ADDENDUM

20 U.S.C. § 1681 provides:

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for

such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association,

Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided,* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or

secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

20 U.S.C. § 1682 provides:

§ 1682. Federal administrative enforcement; report to Congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by using rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be

taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

20 U.S.C. § 1687 provides:

§ 1687. Interpretation of "program or activity"

For the purposes of this chapter, the term "program or activity" and "program" mean all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other post-secondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of this title), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization.

34 C.F.R. § 106.2(h) provides:

§ 106.2 Definitions.

(h) *Recipient* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from

such assistance, including any subunit, successor, assignee, or transferee thereof.

34 C.F.R. § 106.6 provides:

§ 106.6 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 292d and 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

34 C.F.R. § 106.41 provides:

§ 106.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.